

ALL ABOUT ADJUDICATION

Brought to you by the Singapore Mediation Centre

Construction Adjudicator Accreditation Committee



WELCOME NOTE FROM THE COMMITTEE CHAIRMAN



Mr Chow Kok Fong
SMC CAAC Chairman

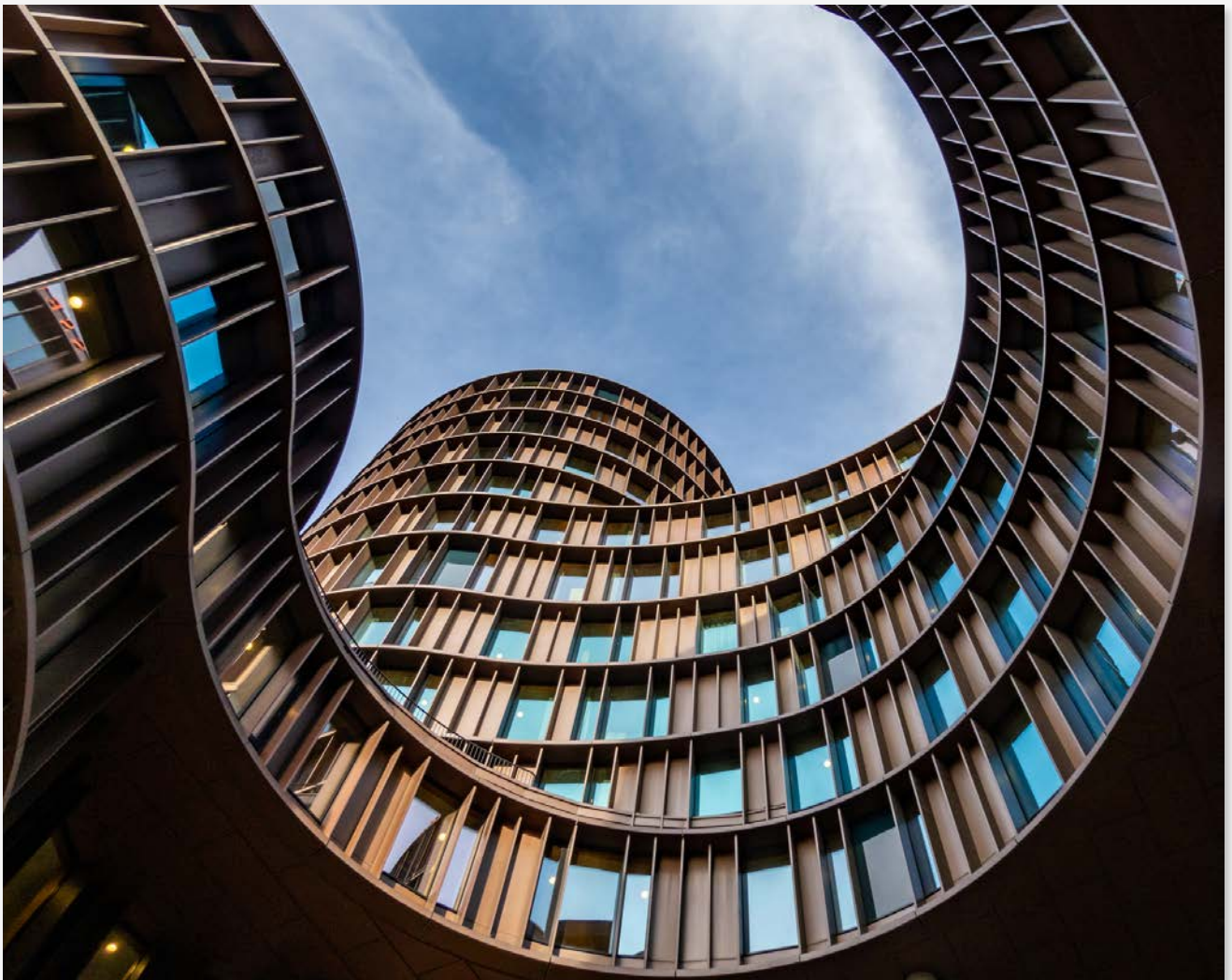
Welcome to the first issue of our adjudication newsletter. The purpose of the newsletter is to (a) provide short updates of instructive case law and legislative developments and (b) serve as a forum for practitioners to share lessons, perspectives and insights on the subject.

The task of planning and editing the newsletter falls on Ms Looi Ming Ming and her team. Ming is an accredited adjudicator and a well-regarded construction lawyer who has appeared in a number of adjudications.

We hope to publish the newsletter two to three times a year. The adjudication community is invited to reach out to us if you wish to contribute and to engage with its readership to develop ideas for improving the regime and to spur the reception of good practices.

What is adjudication?

ADJUDICATION under the Building and Construction Industry Security of Payment Act (the “**Act**”) is a form of dispute resolution for those in the construction industry to obtain prompt and low-cost resolution of payment claim disputes and to help facilitate cashflow. Further requirements are prescribed under the Building and Construction Industry Security of Payment Regulations (the “**Regulations**”).



Case updates.

Asia Grand Pte Ltd v A I Associates Pte Ltd [2023] SGHC 175

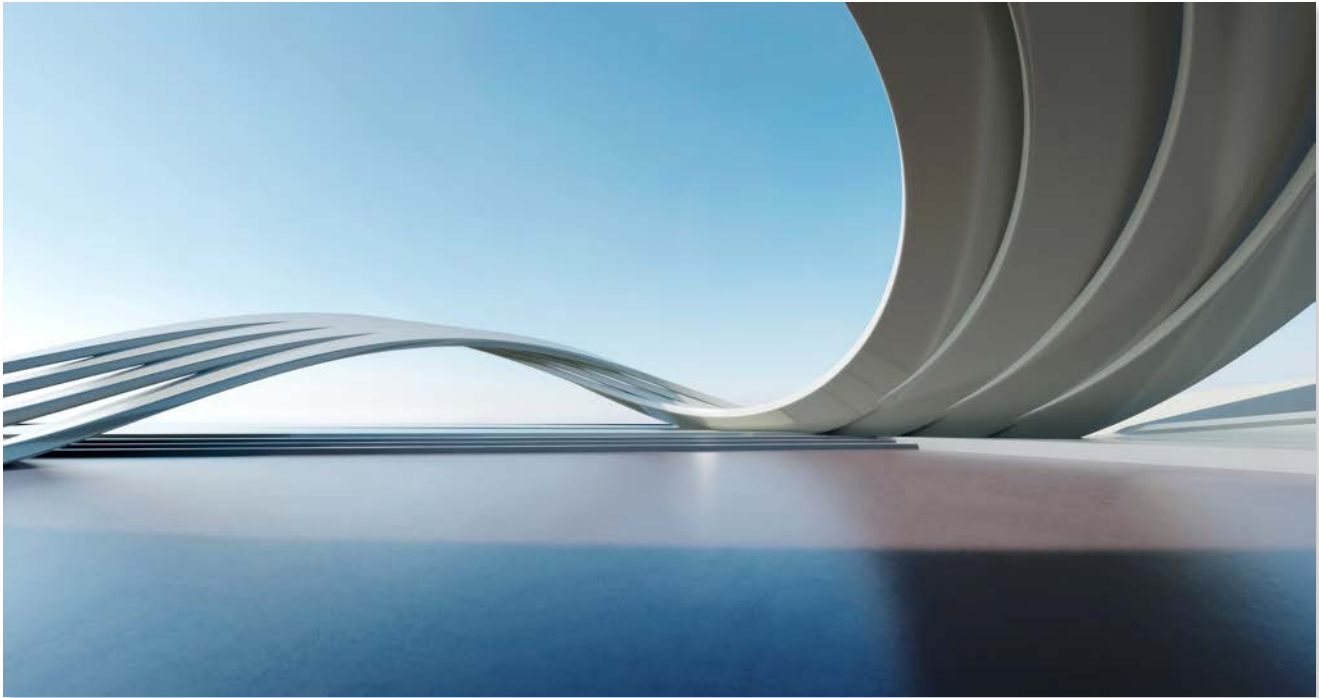
The facts: The contract in question did not provide for any date for service of payment claims, which meant that the prescribed date under the Regulations would apply. The claimant contractor argued that there was no prescribed *date* under the Regulations, only a prescribed *period*, in that a payment claim had to be served *by* the last day of the month. Thus, service before the last day was good service; essentially a payment claim could be served on any day in a month. The employer on the other hand contended that the prescribed date was the last day of the month; the deeming provision in section 10(3)(b) of the Act thus rendered the payment claim that had been served on November 16 to be in fact *deemed* served on the last day of the month, i.e. November 30.

The holding: The High Court found for the employer and allowed its application to set aside the adjudication determination. The adjudication application had been lodged prematurely because it was computed based on the date of the *actual* service of the payment claim on November 16, as opposed to the *deemed* date of service of November 30 (i.e. the last day of the month). The Court however dismissed the employer's alternative arguments (i) that the contract in providing for weekly (as opposed to monthly) claims brought it outside the ambit of the Act, and (ii) the argument that the contractor's failure to provide a performance bond meant that it should not be entitled to bring adjudication proceedings.



Key takeaway.

Singapore High Court holds that where it applies, section 10(3)(b) of the Act deems payment claims served early to be served on the last day of the month.



Case updates.

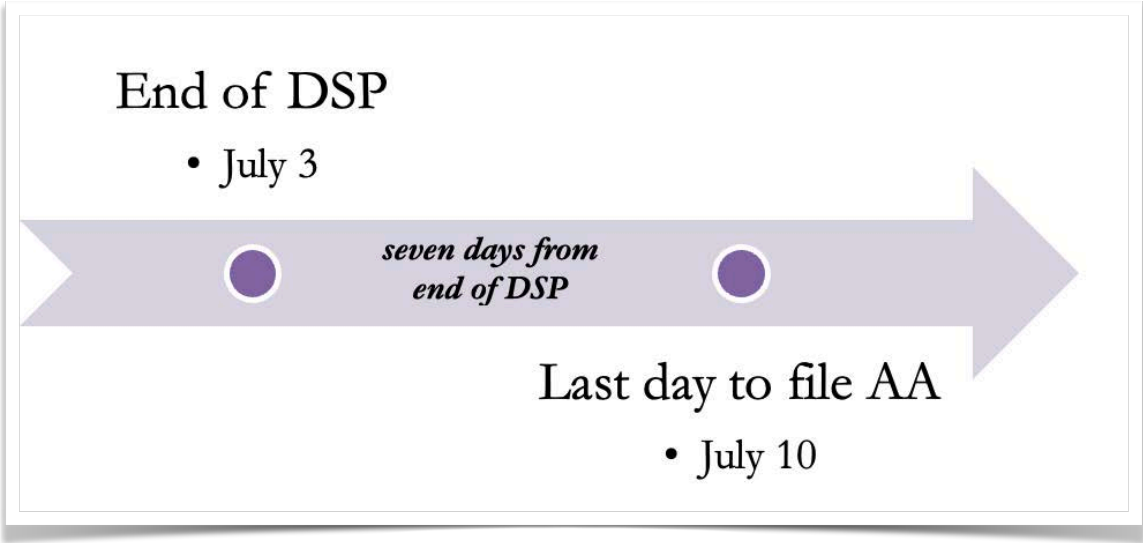
Singapore Appellate Division clarifies the time for lodgement of adjudication applications.

HP Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd
[2024] SGHC(A) 5

The facts: After the main contractor’s failure to provide a payment response, a labour supply sub-contractor lodged an adjudication application for a construction contract on July 6, 2023 (taking into account a public holiday) and obtained a favourable adjudication determination. The main contractor applied to Court to set aside the determination, contending that even considering the public holiday, the adjudication application should have been lodged by July 5, 2023. The main contractor argued that the determination based on a late adjudication application should be set aside. The High Court declined to set aside the determination. The Appellate Division upheld the Judge’s decision.

The holding: Industry practice has traditionally assumed that the seven-day period for adjudication application lodgment is computed from the end of the dispute settlement period (“DSP”). The Court however emphasised that section 13(3)(a) of the SOP Act states that the application must be filed within seven days “*after* the entitlement of the claimant” to make an adjudication application “*first arises* under section 12”. Applying section 50(1) of the Interpretation Act, this means that the day the entitlement first arises must be *excluded* from the computation.

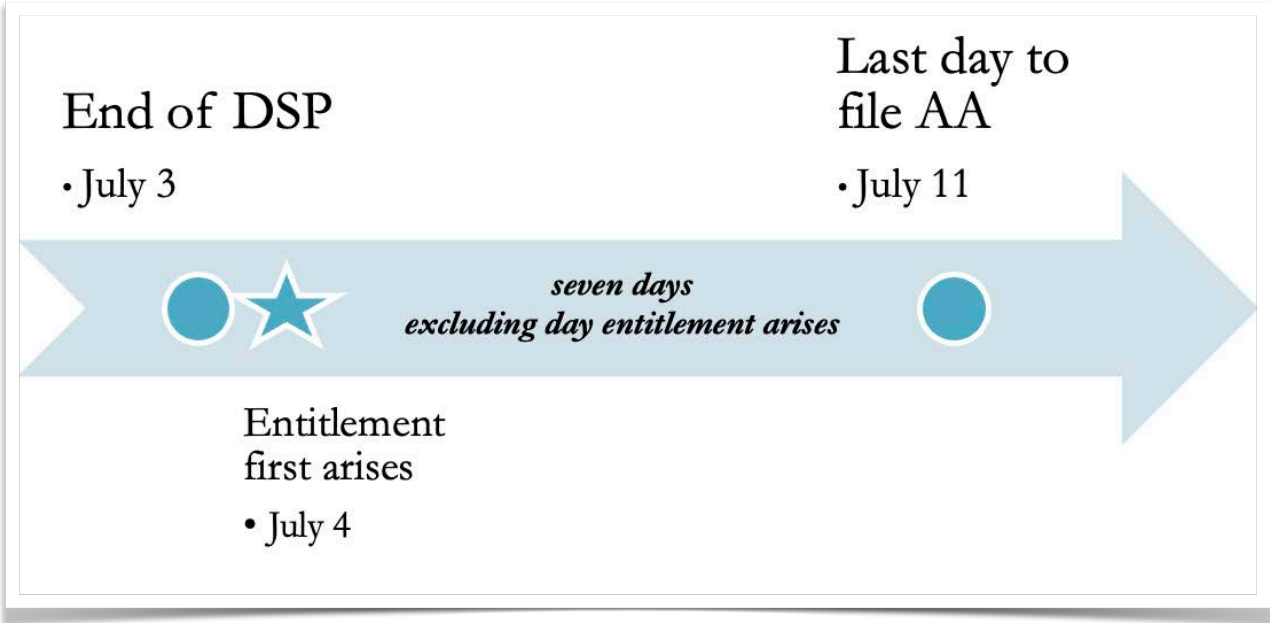
Illustration: previous general industry view



Key takeaway:

The Appellant Division has now clarified the law. The commencement of the seven-day period to file an AA under section 13(3)(a) of the Act *excludes* the day that entitlement arises under section 12(2) of the Act.

Illustration: timeline as clarified by the Appellate



A brief history of the Act.

This year commemorates the 20th anniversary of the enactment of Building and Construction Industry Security of Payment Act 2004 in Singapore. Over the past two decades, the statutory adjudication regime introduced by the Act has transformed the dispute resolution landscape of Singapore's construction industry. The adjudication regime was introduced to address the tremendous cash flow problems facing the industry at that time. As stated in the leading decision *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [21], the Act seeks to achieve this by firstly providing that parties who have done work or supplied goods are entitled to payment as of right (section 5 of the Act) and, secondly, it creates an intervening, provisional process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved (section 21 of the Act).

The intellectual inspiration of the Singapore adjudication regime, as with its counterpart models in the other jurisdictions, was the 1993 Report *Constructing the Team Final Report July 1994 (HMSO)* by the late Sir Michael Latham (the “**Latham Report**”). The Latham Report highlighted difficulties with the terms of standard forms of construction contract prevailing at that time. The report noted in particular (a) the unrealistic expectation that the architect or engineer as contract administrator will be accepted “as impartial adjudicator between client and contractor”, especially over matters relating to measurement and certification of work done and related payment or time issues (p 36 at [5.17]) and (b) the tendency in bespoke contracts for one party “to impose unilateral and onerous conditions driven by greater commercial power” (p 40 at [5.21]). The Report proceeded to specify a number of “*Unfair Conditions*” in construction contracts. Latham's recommendation for these to be invalidated found its expression in the UK Act as well as legislation in subsequent jurisdictions such as Australia, New Zealand and Singapore which followed in this train.

Latham recognised that conciliation and mediation seem to work well in some contracts. However, he considered that the better solution lies in adjudication because “most disputes on site are ... better resolved by speedy decision – i.e. adjudication – rather than by a mediation procedure in which parties reach their own settlement (p 89 at [9.8]). Latham considered



that arbitration has a continuing part to play in dispute resolution within the construction industry, but “it should be a last resort after practical completion” (p 90 at [9.10]). The “system of adjudication” was considered necessary to address a pressing need and, even then, accorded readily with the observations made by some very senior judges (*Latham Report* p 91 at [9.13] citing the observations of Lawton LJ in *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33 at 36 that cases go either to arbitration or a judge and “they drag on and on; the cash flow is held up...”).



In Singapore, the government agency responsible for developing the statutory adjudication regime is the Building and Construction Authority (“**BCA**”). The administration of the regime and the training and accreditation of adjudicators were delegated to the Authorised Nominating Body (“**ANB**”). The Singapore Mediation Centre (“**SMC**”) was appointed as the ANB by the Minister since the enactment of the legislation. Over the past 20 years, the SMC has launched various initiatives to develop and sustain the quality of adjudicators. It publishes the *Singapore Construction Adjudication Review* which reports on selected adjudication determinations considered useful for the guidance of adjudicators and users. Persons seeking to be accredited as adjudicators go through an established accreditation process which includes a written examination component. Adjudicators are further subject to renewal and continuing education requirements. A total of 4773 adjudication applications have been administered by the SMC, with an aggregate claim volume exceeding \$8 billion. In addition, a further 113 review adjudication applications have been filed as of March 31, 2024.

An intimate understanding of the features and operation of the Act is an essential part of the toolkit of a Singapore construction lawyer. The Act was amended in 2018. In moving the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill on 2 October 2018, the Minister of State reported that in so far as its objective to “facilitate cash flow in the construction industry”, the Act “has served the industry well” and that industry players “are now more aware that adjudication is an effective mechanism to resolve payment disputes quickly” (*Singapore Parliamentary Debates*, Official Report (2 October 2018) vol 78 at col 1112 (Zaqy Mohamad, Minister of State for National Development)).

*By Mr Chow Kok Fong
SMC CAAC Chairman*

Upcoming events and courses.



Strategic Conflict Management for Professionals (Module 1)

Date and Time

Mon 5th Aug 2024 – Tues 6th Aug 2024

9:00 AM – 6:00 PM Singapore Time

Register [here](#).

SAVE THE DATE!

Singapore Mediation Lecture & *Appreciation Lunch* 2024

Date and Time

Thurs 29th August 2024

9:00 AM – 2:30 PM Singapore Time



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